

Meeting the requirements of 86 Ill. Adm. Code 130.1935(a)(1)(A)–(E), records reflecting a policy of providing replacement software to licensees at minimal or no charge is exempt from Retailers' Occupation Tax. (This is a GIL.)

June 14, 2001

Dear Xxxxx:

This letter is in response to your letter dated March 22, 2001. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See, 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

We represent a client who has its corporate headquarters in the state of Illinois. Our client makes purchases of licensed software that we believe to be exempt from Illinois Retailer's Occupation Tax.

The transactions at issue are made under a License Agreement entered into between a computer software licensor/vendor and our client, a copy of which is attached hereto.

Illinois Regulation 86 Ill. Adm. Code 130.1935 provides that software, whether canned or custom, which is transferred subject to a license agreement is not taxable, if the license agreement meets the following requirements:

- a. The license is evidenced by a written agreement signed by the licensor and customer;
- b. The Agreement restricts the customer's duplication of the software and restricts the use of the software;
- c. The Agreement prohibits the customer from licensing, sublicensing or transferring the software to a third party;
- d. The vendor will provide another copy of the software at a minimal or no charge if the customer loses or damages the software; and
- e. The customer must destroy or return all copies of the software to the vendor at the end of the license period.

Although subsection (d) of the above paragraph is not expressly contained in the agreement, the Department has ruled that that requirement can be deemed met when vendors' records reflect policies of providing copies of software at minimal or no cost if licensee customers lose or damage the software, even when there are no provisions to

this effect contained in the agreement. (ST 98-0080-GIL, 3/18/98) The vendor has stated that they will provide a free copy of the software in the event the customer loses or damages their original software.

We request your opinion as to whether the facts as stated above and the provisions found in the Agreement would classify the transaction at issue as exempt from Retailer's Occupation Tax.

Thank you for your attention to this matter.

The provisions of 86 Ill. Adm. Code 130.1935(a) define software as including all operational, applicational, utilities, compilers, templates, shells and all other forms. Canned software is considered to be tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means or other media. The sale at retail, or transfer, of canned software intended for general or repeated use is taxable.

As you stated in your letter, a license of software is not a taxable retail sale if the license agreement meets requirements (A) through (E) of 86 Ill. Adm. Code 130.1935(a)(1). Although subsection 130.1935(a)(1)(D) is not expressly contained within the license agreement attached to your letter, you indicate that the vendor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software. Provided that your client maintains evidence demonstrating compliance to Section 130.1935(a)(1)(D) by either stating the policy in the license agreement, offers evidence supported by the licensor's books or records, or offers evidence supported by a notarized statement made under the penalties of perjury by the licensor, no Retailers' Occupation Tax is incurred.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Shane McCreery

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SM:JTG:msk